92-1501

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DEAN WITTER REYNOLDS INC.,
JACK A. VICKERS, III AND WILLIAM B. GRAHAM

Petitioners,

v.

HOWARD W. ROSENTHAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did Congressional Enactment of Section 27A of the Securities Exchange Act of 1934 Encroach upon the Judicial Power of the Federal Courts and Thereby Violate the Separation of Powers Doctrine Embodied in the United States Constitution?

II. Does Section 27A Violate the Due Process Guarantees of the United States Constitution?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Tenth Circuit were Dean Witter Reynolds Inc., Jack A. Vickers, III, William B. Graham and Castle Pines Land Company, Appellees, and Howard W. Rosenthal, for himself and as a purported representative of a class, Appellant.

STATEMENT PURSUANT TO RULE 29.1

Listed below are all the parent companies and subsidiaries (except wholly owned subsidiaries) of Petitioner Dean Witter Reynolds Inc.:

1. Sears Roebuck and Co.

STATEMENT PURSUANT TO RULE 29.4(b)

28 U.S.C. § 2403(a) may be applicable. On or about April 6, 1992, the Clerk of the United States District Court, District of Colorado, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of Section 27A of the Securities Exchange Act of 1934 was drawn into question. The petition for writ of certiorari was served on the Solicitor General of the United States as set forth in the Certificate of Service filed herewith.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit dated December 17, 1992, which appears in the Appendix at A-1.

The Tenth Circuit's decision reversed the district court's dismissal of this litigation. The district court held that Section 27A of the Securities Exchange Act of 1934 is unconstitutional and, therefore, denied Plaintiff Rosenthal's motion to reinstate his previously dismissed claim under Section 10(b) of the Securities Exchange Act of 1934. In reversing the district court, the Tenth Circuit relied entirely on its opinion in *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992). Because of its significance to this case, the Tenth Circuit's opinion in *Anixter* appears in the Appendix at A-15.

OPINIONS BELOW

The Order and Judgment of the Tenth Circuit appears in the Appendix at A-1. The Order and Judgment is unreported. The Order of the Tenth Circuit rejecting the suggestion for initial hearing *en banc* appears in the Appendix at A-3. The Order is unreported. The Order of the district court denying reinstatement of Respondent's claims appears in the Appendix at A-5. The Order is unreported. The Order of the district court dismissing Respondent's claims without prejudice appears in the Appendix at A-13. The Order is unreported.

JURISDICTION

The Tenth Circuit's decision was entered on December 17, 1992. No petition for rehearing was filed by Petitioners. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1, provides:

> (a) *Effect on Pending Causes of Action.* The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *EFFECT ON DISMISSED CAUSES OF ACTION.* Any private civil action implied under Section 10(b) of [the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991 (1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in

the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than sixty days after the date of enactment of this section.

Sections 9(e) and 10(b) of the Securities Exchange Act of 1934 are set forth verbatim in the Appendix at A-50 and A-51, respectively. Article I, Section 1 and Article III, Section 1 of the Constitution of the United States are set forth verbatim in the Appendix at A-52 and A-53, respectively.

STATEMENT OF THE CASE

Petitioner Dean Witter Reynolds Inc. ("Dean Witter") underwrote an issuance of municipal bonds by a Colorado special district, Castle Pines North Metropolitan District, in 1986. The total amount of the bond issue was $38,170,000. Respondent Rosenthal ("Rosenthal"), a Pennsylvania resident, purchased $25,000 of these bonds in the initial offering on July 17, 1986, from his Dean Witter broker in Philadelphia, Pennsylvania.

After the bonds defaulted, Rosenthal filed a complaint against Dean Witter and others in the United States District Court for the District of Colorado alleging one federal securities law claim under Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") and two state common law claims based on negligent misrepresentation and fraud. The complaint was filed on April 11, 1991, more than four years after the purchase of the bonds. Rosenthal claimed to file his action on behalf of all persons who purchased the bonds between July 17, 1986 and November 14, 1990. Based upon then existing Third Circuit precedent, if Rosenthal had filed his action where the transaction occurred, his federal claims would have been time barred. *In re Data Access Systems*, 843 F.2d 1537 (3d Cir. 1988).

On June 20, 1991, this Court held that the statute of limitations for claims under Section 10(b) was one year after

discovery of the alleged fraud, but in no event more than three years after the violation giving rise to the claim. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 111 S. Ct. 2773, *reh'g denied*, 112 S. Ct. 27 (1991). This decision was applied retroactively to all cases pending at the time, including Rosenthal's. Admitting that his federal claims were barred in every circuit, Rosenthal asked the district court to dismiss his federal action in order that he might pursue his remaining state claims in state court. On September 23, 1991, the trial court dismissed the entire action without prejudice. Appendix at A-13.

Certain members of the United States Congress took issue with this Court's opinion in *Lampf* and attempted to induce Congress to enact a statute of limitations for the implied cause of action under Section 10(b). Instead of creating a new statute of limitations for all 10(b) claims or amending the statute which this Court declared to be the limitation period for 10(b) actions in *Lampf*, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991 ("The Act"). Section 476 of the Act was designated Section 27A of the Securities Exchange Act of 1934, which directs courts to reinstate 10(b) cases which were pending before the announcement of *Lampf* and which were subsequently dismissed as a result of *Lampf*.

On February 7, 1992, Rosenthal filed a motion to reinstate his previously dismissed claim under Section 10(b). On June 15, 1992, the district court ruled that Section 27A was unconstitutional, drawing in part upon *Bank of Denver v. Southeastern Capital Group, Inc.*, 789 F. Supp. 1092 (D. Colo. 1992). The trial court ruled in an unpublished opinion that Section 27A violated the separation of powers doctrine. Appendix at A-5.

Shortly after Rosenthal appealed the judgment of the district court, the Tenth Circuit announced its decision in *Anixter v. Home-Stake Production, Co.*, 977 F.2d 1533 (10th Cir. 1992), which held that Section 27A is constitutional. In

reliance on its opinion in *Anixter*, the Tenth Circuit reversed the judgment of the district court in the instant case and remanded the action to the district court. Appendix at A-1. On January 22, 1993, the Tenth Circuit issued its mandate to the district court. The basis for federal jurisdiction in the court of first instance was 15 U.S.C. § 77v, 78aa and 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

1. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH PREVIOUS OPINIONS OF THIS COURT WHICH SET THE BOUNDARIES OF THE LEGISLATIVE POWER OF CONGRESS.

The power of Congress to make, amend and repeal laws is not at issue here. Congress' authority to fulfill those uniquely legislative functions is expressly provided in the Constitution and widely recognized in the courts. *See* U.S. Constit. Art. I, § 1. In keeping with its constitutional mandate, Congress is also free to respond to decisions of this Court by enacting, amending or repealing applicable law. Congress may not, however, as it did in its enactment of Section 27A, vitiate this Court's decision in *Lampf* without amending or creating substantive law. Such Congressional action violates the separation of powers inherent in the Constitution and represents an encroachment into the judicial function, as demonstrated by previous Supreme Court decisions.

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), this court struck down an act of Congress because it violated the separation of powers doctrine. The controlling purpose of the federal legislation was to deny presidential pardons the effect intended by the president and the effect this Court had adjudged them to have in an earlier decision, *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870). This Court's analysis focused on the fact that no new law had been created. Rather,

the legislation represented Congress' attempt to prescribe a rule of decision for pending cases by requiring the court to dismiss the claims of any claimant who had been granted a presidential pardon. *Klein*, 80 U.S. at 146. Similarly, Section 27A attempts to overrule *Lampf*, but does not create, amend or repeal substantive law.

By way of a more recent example, this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), elicited a constitutionally permissible response from Congress although it vigorously disagreed with this Court's narrow interpretation of the federal statute implicated in *Patterson*. Congress responded by enacting a substantive amendment to the Civil Rights Act of 1991 ("CRA 1991"), 42 U.S.C. § 1981(b). The legislative history clearly indicates that Congress intended to overrule the effect of *Patterson*.[1] In this instance, Congress acted within the bounds of its legislative authority to make, amend or repeal the law in order to effectively "overrule" this Court's decision. This same tact was not followed by Congress in response to *Lampf*. This failure of the Legislature to change the underlying law forms the basis of the constitutional infirmities of Section 27A.

In *Lampf*, this Court interpreted existing Supreme Court opinions and opted to borrow Section 9(e) of the Securities Exchange Act of 1934 ("Section 9(e)") as the statute of limitations to govern actions under Section 10(b). *Lampf*, 111 S. Ct. at 2780. In adopting 9(e) as the statute of limitations, this Court based its decision upon a common law exception to the Rules of Decision Act, 28 U.S.C. § 1652. *Lampf*, 111 S. Ct. at 2778. *See, e.g., Del Costello v. Int'l Bhd. of Teamsters*, 462

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[1] CRA 1991 added an interpretive subsection (b) the 42 U.S.C. § 1981 which provided a statutory definition of the phrase "make and enforce contracts." The legislative history states "Subsection (b) — Scope — This subsection overrules *Patterson* by adding a new subsection to Section 1981." 1991 U.S. Code Cong. & Ad. News 730.

U.S. 151, 161 (1983). This Court endorses "federal borrowing" when federal law provides a closer analogy than available state statutes and when the federal policies at stake make it more appropriate to do so. *See, Reed v. United Transportation Union*, 488 U.S. 319, 324 (1989), quoting *Del Costello*, 462 U.S. at 172. The Court intended Section 9(e) to apply retroactively to pending cases such as the instant case. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). Thus, the retroactive application of Section 9(e) arises from this Court's interpretation of the doctrines of *stare decisis* and the language of Article III rather than its construction of a particular statute.

Congressional reaction to *Lampf* did not result in it amending the Rules of Decision Act, nor did it amend Section 9(e). Both statutes remain unchanged after the passage of Section 27A. Through the operation of Section 27A, Congress carved out the retroactive application of *Lampf* and directed courts to ignore this Court's judgment in *James B. Beam Distilling Co.* Further, Section 27A has no prospective effect and does not amend any substantive law. Congress made several attempts to lengthen the one year/three year statute of limitations called for in *Lampf*, but the members of Congress could not achieve the consensus necessary to enact a new substantive law.[2] This Court's decision in *Lampf* was eviscerated by a last minute congressional compromise because Congress was unable to summon the votes to change the substantive law.

Both the Eleventh and the Tenth Circuits have ruled that Section 27A does not encroach on the judicial power. *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th

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[2] 137 Cong. Rec. S10,675 through 76 S10,691-92 (daily ed. July 23, 1991); 137 Cong. Rec. H6316 (daily ed. August 1, 1991); 137 Cong. Rec. S17,356 (daily ed. November 21, 1991); 137 Cong. Rec. S18,522 (daily ed. November 26, 1991); 137 Cong. Rec. S18,624 (daily ed. November 27, 1991).

Cir. 1992). Petitioners are aware that the defendants in *Anixter* have filed a petition for writ of certiorari with this Court. *See, Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *petition for cert. filed sub. nom. Cross v. Thorner*, 61 U.S.L.W. 2139 (U.S. Dec. 22, 1992) (No. 92-1099). Petitioners respectfully suggest that both *Henderson* and *Anixter* are based upon a faulty reading of this Court's opinion in *Robertson v. Seattle Audubon Society*, 112 S.Ct. 1407 (1992). *See, Henderson*, 971 F.2d at 1572; *Anixter*, 977 F.2d at 1545. This Court in *Robertson* expressly avoided basing its decision on separation of powers principles, finding that Congress had changed the underlying substantive statutory law. *Robertson*, 112 S. Ct. at 1414. Therefore, neither *Henderson* nor *Anixter* provides a separation of powers analysis of Section 27A which is consistent with existing precedent of this Court. As a consequence, the Tenth Circuit's decision in this case was flawed due to its reliance on *Anixter*.

This Court should grant the petition for writ of certiorari to restrict the encroachment onto its judicial powers and reject the faulty reading of *Robertson* by the Tenth and Eleventh Circuits.

2. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE AND PROVIDES THE COURT WITH THE OPPORTUNITY TO FURTHER THE DEVELOPMENT OF THE LAW BY CLARIFYING THE BOUNDARIES BETWEEN THE JUDICIAL AND LEGISLATIVE POWERS.

More than 120 years ago, this Court articulated the boundaries between the legislative power and the judicial power in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). The instant case presents the ideal opportunity for this Court to address this precise issue and clarify the exact boundaries between these coordinate branches of government. The fact that clarification is needed is amply demonstrated by the number of district courts that have held Section 27A unconstitutional under *Klein*. *See, e.g., Bank of*

Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092 (D. Colo. 1992); *In re Brichard Securities Litigation*, 788 F. Supp. 1098 (N.D. Cal. 1992). Not only is there disagreement among district courts in the same circuit, but there is disagreement between the judges in the same district as to the constitutionality of Section 27A. Appendix at A-54.

This Court rightly rejected the invitation to undertake a broad question of Article III jurisprudence last term in *Robertson v. Seattle Audubon Society*, 112 S. Ct. 1407 (1992). The statute in *Robertson* did not challenge a decision of this Court, but merely amended certain technical provisions of existing environmental law. Because this case presents the issue of Congress tampering with a precedent of this Court, and with the manner in which that precedent is applied to other litigants, the broader separation of powers issues are squarely raised.

This Court should not be deterred from granting certiorari because the issue involves a discrete number of litigants. Historically, this Court has addressed separation of powers issues even when they involved a limited number of litigants. *See, e.g., Nixon v. United States*, 113 S. Ct. 732 (1993); *Powell v. McCormack*, 395 U.S. 486 (1969); and *Baker v. Carr*, 369 U.S. 186 (1962). The Court has accepted these cases in its role as the ultimate interpreter of the Constitution. It is the ultimate responsibility of this Court to interpret the Constitution and engage in the delicate exercise of determining whether a branch of government has exceeded the authority granted to it. *Baker v. Carr*, 369 U.S. at 211.

This Court has long shown restraint from interfering with the business of the other branches of government. *See, Nixon v. United States*, 113 S. Ct. at 747-748 (Souter, J., concurring). However, when the Legislature has invaded either the judicial power or the executive power, this Court has acted to preserve the necessary balance of power and has not hesitated to invalidate provisions of laws which violate this principle. *See, INS v. Chadha*, 462 U.S. 919 (1983); *Northern*

Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982); and *Buckley v. Valeo*, 424 U.S. 1 (1976). This case does not invite the Court to make a policy decision as to the best statute of limitations for Section 10(b) actions. This case presents the more fundamental issue of whether Congress, having not made the policy decision regarding the statute of limitations, can interfere with the precedential effect of a Supreme Court decision.

The tension between the legislative powers in Article I and judicial powers in Article III has been present since they were established. Even before the adoption of the Constitution, the potential friction between the two was obvious. In The Federalist No. 81, Hamilton commented on the subject of judicial review, an aspect of the separation of powers doctrine, as follows:

> And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge.[3]

This Court has been periodically called upon to resolve these tensions and this case presents a classic example of Congress subjecting the judicial function to "its revision and control."

It is difficult to imagine a task more central to the traditional judging function than the application of Supreme Court precedent to existing cases. This Court's judgment in *Beam* required this Court and the lower federal courts to apply decisions such as *Lampf* retroactively. Section 27A nullifies the Court's judgment in *Beam* and directs lower courts and this Court to ignore the Court's judgment.

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[3] The Federalist No. 81 at 524-525.

The opinion in *Beam* amply demonstrates how important the application of precedent is to the judicial function. Regardless of whether the retroactive application of *Lampf* is compelled by *stare decisis*, *see James B. Beam Distilling Co.*, 111 S. Ct. at 2448 (Souter, J.) or by Article III itself, *see id.*, 111 S. Ct. at 2450 (Blackmun, J., concurring); *id.*, 111 S. Ct. at 2451 (Scalia, J., concurring), there can be no doubt that this type of decision lies at the heart of the judicial function.

In effect, Section 27A directs this Court to apply *Lampf* in a selectively prospective manner. That is, Congress has mandated that the precedent of *Lampf* will apply to the parties in *Lampf* and to litigants filing suit after the *Lampf* decision, but not to cases pending at the time of the decision. This is in direct conflict with the judgment of this Court in *Beam*.

This Court has recognized that the framers of the Constitution frequently expressed the fear that the legislative branch will aggrandize itself at the expense of the executive and judicial branches. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *Buckley v. Valeo*, 424 U.S. 1, 130 (1976). This tendency of the legislative branch to attempt to increase its power was one of the central reasons behind the separation of powers doctrine. 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 74, 76 (1911); The Federalist No. 48, pp. 308-310. This Court has determined legislation to be unconstitutional when it has detected this aggrandizement at the expense of other branches. *See Bowsher*, 478 U.S. at 736 and *Buckley*, 424 U.S. 1 at 144. Section 27A is a stark example of this unconstitutional aggrandizement.

If Section 27A is allowed to stand, it will undoubtedly be perceived as tacit approval of Congress' encroachment into the judicial power. The Tenth Circuit's decision encourages the unconstitutional aggrandizement by the Legislature and will promote more interference with the Judiciary in the

future. This Court should grant the petition for writ of certiorari in this case to reject this encroachment and articulate the limitation on the legislative power.[4]

3. GRANTING CERTIORARI IN THIS CASE WILL ADVANCE THE IMPORTANT FEDERAL INTERESTS IN JUDICIAL ECONOMY, FINALITY OF LITIGATION AND MANAGEMENT OF COMPLEX SECURITIES CASES.

The *Lampf* and *Beam* decisions reflect a carefully crafted consensus of the Court that judicial economy and finality to litigation are important federal interests to be protected in the management of complex cases such as this one. Section 27A destroys this consensus and forces a discrete group of litigants to digress to the state of the law before *Lampf*. The statute also impairs the federal interest in judicial economy and finality.

The chaotic nature of the law before *Lampf* is reflected by this case. Had Rosenthal filed his action in the trial court in Philadelphia, where he lived and where the transaction occurred, his action would have been dismissed by controlling Third Circuit precedent. *See, In re Data Access Systems*, 843 F.2d 1537 (3d Cir. 1988). However, through adroit forum shopping, Rosenthal was able to find a jurisdiction which might conceivably breathe life into his otherwise barred claim. Forum shopping was one evil which this Court sought to prevent in *Lampf*. *See Lampf*, 111 S. Ct. at 2779.

Section 27A now encourages, rather than discourages, litigation. If Section 27A is allowed to stand, results will be radically different based upon the particular circuit in which a case was properly filed. Principles of equality and *stare decisis* require that similarly situated litigants in the civil

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[4] This concern has obviously been long-standing. The Legislature "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments." The *Federalist* No. 48 at 334.

context be treated the same. Nevertheless, Section 27A clearly violates this principle. Parties will be encouraged to litigate venue and choice of laws decisions in an effort to obtain the most favorable limitations period.

This case illustrates how much litigation will be encouraged by Section 27A. Rosenthal purports to bring this action on behalf of all the individuals who purchased Castle Pines North Metropolitan District bonds regardless of where they are located. The trial court dismissed the action prior to any hearing on class certification. If this action proceeds past the certification stage, the trial court will be faced with the herculean task of determining which statute of limitations applies to each class member's claim. Depending upon where each individual's claim accrued, the trial judge will have to apply limitations periods of the applicable states and the one year/three year periods adopted in certain circuits. *Ceres Partners v. GEL Associates*, 918 F.2d 349, 360 (2d Cir. 1990) citing *Kronfeld v. Advest, Inc.*, 675 F. Supp. 1449, 1457-58 & n.21 (S.D.N.Y. 1987); *In re National Student Marketing Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 97,926 (D.C.D.C. Mar. 26, 1981). This would perpetuate the pre-*Lampf* burden on a substantial number of trial courts across the country and destroy the judicial economy that this Court endeavored to protect.

Since Section 27A destroys the uniformity which the Court sought to obtain in *Lampf*, litigants filing suit after *Lampf* will have a different statute of limitations than those who filed before *Lampf*. Pre-*Lampf* litigants who filed their claims at the same time would also be subject to different results based upon the fortuitous circumstances of where the alleged violation occurred. This Court should accept this case to put an end to the forum shopping practices and reestablish the uniformity and finality to the law which was so important to the Court in *Lampf*.

4. THE TENTH CIRCUIT'S DECISION IS AT ODDS WITH EXISTING PRECEDENT RECOGNIZING CERTAIN DUE PROCESS GUARANTEES.

In *Hodges v. Snyder*, 261 U.S. 600 (1923), this Court held that private rights of parties to litigation which have been vested by the judgment of a court cannot be taken away by subsequent legislation and must be thereafter enforced by the court regardless of such legislation. Earlier, in *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), this Court recognized that an act of Congress cannot annul the judgment of a court already taken upon the private rights of parties. In the case before this Court, as well as countless other pre-*Lampf* cases, decisions had been entered dismissing investors' 10(b) claims as time-barred. Section 27A directly conflicts with the precedents of this Court, finding that a judgment cannot be taken away by subsequent legislation.

The retroactive effect of federal legislation such as Section 27A raises additional due process concerns. This Court has already recognized that what Congress can legislate prospectively, it may not necessarily legislate retroactively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justification for the latter may not suffice for the former. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Such burden is met by showing that retroactive application of the legislation is justified by a rational legislative purpose. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

According to one commentator,

> [T]here can be little doubt under existing precedent that if Congress had acted to adopt a new statutory period and made it retroactive that it would be

> rationally promoting a legitimate purpose. But Congress put off such an action both in terms of prospective and retroactive application of a new period of limitation. Rather, it chose to reverse the Court's retroactive application of *Lampf* for the limited benefit of some of the plaintiffs who had actions pending on June 20, 1991 . . . [Although] Section 27A may preserve actions against some defendants whose past behavior was viewed by some members of Congress as contemptible, how does it advance the objective of effective enforcement of the securities laws?[5]

The controlling objective of Section 27A was to interfere with the precedential effect of *Lampf*, not to further the public interest in enforcement of the securities laws. For this reason, Section 27A fails to pass constitutional muster under the due process clause.

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[5] H. Bloomenthal, Securities and Federal Corporate Law, Ch. 9A Statutes of Limitations under the Securities Acts (1992).

CONCLUSION

The writ of certiorari requested by this petition should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-1215
(D.C. No. 91-F-591)
(D. Colorado)

HOWARD ROSENTHAL, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

DEAN WITTER REYNOLDS, INC.; CASTLE PINES LAND COMPANY; FRANK B. WALKER; JACK A. VICKERS, III; HELEN MCMASTER COULSON; WILLIAM B. GRAHAM; LARRY REICHERT,

Defendants-Appellees.

ORDER AND JUDGMENT*
Entered December 17, 1992

Before LOGAN, MOORE, and BRORBY, Circuit Judges.

Admitting this case is governed by our holding in *Anixter v. Home-Stake Production Co.*, ____ F.2d ____, No. 90-5040, etc., 1992 WL 300892 (10th Cir. Oct. 23, 1992), appellees nonetheless invite us to reconsider our opinion. We decline the invitation.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

REVERSED AND REMANDED.

Entered for the Court

/s/ John P. Moore

JOHN P. MOORE,
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-1215

HOWARD ROSENTHAL, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

DEAN WITTER REYNOLDS, INC., CASTLE PINES LAND COMPANY, FRANK B. WALKER, JACK A. VICKERS, III, HELEN MCMASTER COULSON, WILLIAM B. GRAHAM, LARRY REICHERT,

Defendants-Appellees.

ORDER
Filed December 14, 1992

Before McKAY, Chief Judge, and LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

Pursuant to Fed. R. App. P. 35 (b), appellee's suggestion for an initial hearing en banc was circulated to the judges of this

court in regular active service. No judge having called for a poll, the suggestion for initial hearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-F-591

HOWARD ROSENTHAL, on behalf of himself and all others similarly situated,

Plaintiff,

v.

DEAN WITTER REYNOLDS, INC., CASTLE PINES LAND COMPANY, FRANK B. WALKER, JACK A. VICKERS, III, HELEN MCMASTER COULSON, WILLIAM B. GRAHAM AND LARRY REICHERT,

Defendants.

ORDER

This matter comes before the Court on Plaintiff's Motion for Reinstatement, filed February 7, 1992. The motion has been fully briefed by the litigants. Briefs were filed through May 1992. Jurisdiction is based upon 28 U.S.C.A. § 1331 (West Supp. 1992). For the reasons stated below, the motion is DENIED.

I.

BACKGROUND

On April 11, 1991, Plaintiff Howard Rosenthal filed his complaint, alleging one federal securities law claim under Section 10(b) of the Securities and Exchange Act of 1934, and

two state common law claims for negligent misrepresentation and fraud.[1] On July 22, 1991, Plaintiff filed a request to hold this action in abeyance, in which Plaintiff agreed to dismiss the above captioned action if the Supreme Court denied the petition for rehearing in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). In *Lampf*, the Supreme Court changed the limitations period applicable to § 10(b) claims. We entered an Order on July 24, 1991, administratively closing the above captioned action pending the Supreme Court's consideration of a petition for rehearing filed in *Lampf*.

On September 13, 1991, the Supreme Court denied the petition for rehearing in *Lampf*. Thereafter, Plaintiff filed a motion to dismiss, which we granted on September 23, 1991. However, on February 7, 1992, Plaintiff filed the Motion for Reinstatement that is presently before the Court under § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Public Law 102-242 (the "Act"). Plaintiff asserted that because of the Act, his claim was no longer time-barred.

Section 476 of the Act invited plaintiffs whose § 10(b) claims had been dismissed under *Lampf* to file motions for reinstatement in federal court. The relevant portion of the Act provides:

> (b) Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time-barred subsequent to June 19, 1991, and

---

[1] All factual recitations in this Order have been alleged in the litigants' pleadings.

> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction . . . as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the Plaintiff not later than 60 days after the date of enactment of this section.

Defendant Dean Witter Reynolds, Inc. challenged Plaintiff's Motion for Reinstatement, arguing that § 476 of the Act unconstitutionally violates the separation of powers doctrine. We notified the United States Attorney General of the claim of unconstitutionality on April 6, 1992.

As § 476 of the Act unconstitutionally violates the separation of powers doctrine, Plaintiff's Motion for Reinstatement is DENIED.

II.

THE SEPARATION OF POWERS DOCTRINE

The Framers of the Constitution incorporated the separation of powers doctrine in the Constitution by delineating the powers of the judicial, legislative, and executive branches. The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

Under the separation of powers doctrine, the legislative branch has the power to enact the law, while the power to interpret the law is reserved for the judicial branch. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803), the Supreme Court stated, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule."

While the legislative branch has the power to change the law, it does not have the power to reassign or usurp the powers delegated to other branches. *Mistretta*, 488 U.S. at 382.

In order to keep any single branch from accumulating excessive authority, the Framers instituted a system of checks and balances as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). This dual concern about encroachment and aggrandizement is central to the Supreme Court's separation-of-powers jurisprudence, and the Supreme Court has "not hesitated to strike down provisions of law that either accrete to a single branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Mistretta*, 488 U.S. at 382. Early Supreme Court decisions provided that no decision of any court of the United States can be subject to reversion or suspension by the legislature, in whom no judicial power is vested. *Hayburn's Case*, 2 U.S. (2 Dall.) 402 (1792).

An instance of Congress infringing on the judicial power of interpretation by prescribing rules of decision occurred in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Klein sued as the administrator for V.F. Wilson, a Confederate, to recover the proceeds from the sale of cotton confiscated by government agents during the Civil War. The suit was brought under a statute giving confederate property owners the right to recover their property upon proof of their loyalty to the federal government. The Supreme Court had held previously that a pardon was proof of loyalty. *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869). President Lincoln issued an executive proclamation granting a full pardon to persons willing to take a loyalty oath. Wilson had taken the loyalty oath and received a Presidential pardon, so Klein won in the Court of Claims.

Before the government's appeal, Congress passed a statute which precluded evidence of a Presidential pardon as admissible evidence by a claimant as proof of loyalty. Instead, the pardon became proof of disloyalty. The Supreme Court declared the law unconstitutional as an encroachment on the power of the judiciary. *Klein*, 80 U.S. at 146-47. The Court found that Congress' act amounted to an attempt to regulate the courts by prescribing rules of decision. The Court held that Congress does not have the power to prescribe rules of decision for cases pending before the judicial branch of the government. *Id.* at 146.

In the instant action, Plaintiff contends that the application of *Klein* is inappropriate to this case. Plaintiff interprets *Klein* to stand for the proposition that Congress may not pass laws dictating decisions in specific cases. We disagree.

Plaintiff's reading of *Klein* is too narrow. *Klein* holds that Congress cannot overturn the Supreme Court's interpretation of a statute so as to direct a court's decision without changing the underlying law. This interpretation of *Klein* was recently applied by the Ninth Circuit in *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 1407 (1992):

> [T]he critical distinction, for purposes of deciding the limits of Congress' authority to affect pending litigation through statute, is between actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case without repealing or amending the law underlying the litigation, which is not permissible.

Thus, Congress can amend or repeal any law, but it "cannot prescribe a rule of decision where no new circumstances have been created by legislation." *Id.*

III.

SECTION 476 OF THE ACT

A court should invalidate a statute only for the most compelling constitutional reasons. *Bowsher*, 478 U.S. at 736. Hence, we must construe § 476 in a manner which renders it constitutional if fairly possible. *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988). However, we should not resort to "disingenuous evasion" to avoid a determination of constitutionality. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). In spite of this stringent standard, there are compelling reasons for finding that § 476 of the Act violates the principle of the separation of powers and is therefore unconstitutional.

In *Lampf*, the Supreme Court adopted a three year repose period and a one year discovery period for § 10(b) claims. The Court applied this rule retroactively to all pending cases. Although Congress is free to amend or change the law, in enacting § 476, Congress has done neither. Congress did not amend § 476 by adopting a new statute of limitations other than that set out in *Lampf*, nor did Congress codify *Lampf*. Rather, Congress overturned the retroactive application of the limitations period determined in *Lampf*.

As such, only a discrete group of cases were affected by the Act. As the United States District Court for the District of Colorado recently stated, "By selecting a discrete body of pending actions for special treatment under § 476, Congress demonstrated that its sole purpose was to nullify the Supreme Court's interpretation of § 10(b) without amending § 10(b) itself. In so doing, Congress usurped the power set aside to the judiciary by the Constitution." *Bank of Denver v. Southeastern Capital Group, Inc.*, 1992 WL 59024 at *5 (D. Colo. Mar. 20, 1992). The court unequivocally stated that § 476 is an unconstitutional violation of the separation of powers doctrine. *Id.* at 9; *In Re Branchard Sec. Litig.*, 1992 WL 63399 at *4 (N.D. Cal. Mar. 27, 1992).

Although § 476 does not direct any particular findings of fact or a decision on the merits of the § 10(b) claim, it does direct an application of law to fact. This was precisely the type of statute declared unconstitutional in *Klein*. In *Klein*, the statute did not direct a decision on the plaintiff's claim for the return of his property. Rather, the statute prescribed the interpretive rule that presidential pardons be considered proof of disloyalty.

Here, § 476 also prescribes an interpretive rule: the limitations period for a limited group of § 10(b) actions is that period applicable in the jurisdiction on June 19, 1991. "In both instances, the prescribed interpretation was at odds with prior Supreme Court law and the prescribed interpretation resolved a question dispositive of the action." *Bank of Denver*, 1992 WL 59024 at *5. Consequently, § 476 prescribes a rule of decision within the meaning of *Klein*.

The effect of § 476 is that Congress is intruding on the powers of the judiciary. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), the Supreme Court vacated a decree calling for abatement of a nuisance. In doing so, the Court accepted the general proposition, that legislation "cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff." *Id.* at 431. In enacting legislation such as § 476, Congress is performing a legislative appeal over judicial action. *Ed Plaut v. Spendthrift Farm, Inc.*, 1992 WL 78067 at *3 (E.D. Ky. Apr. 13, 1992).

In effect, Congress has acted as a "'super-appellate court,' overturning *Lampf* without replacing that decision with any new law." *Bank of Denver*, 1992 WL 59024 at *5. To allow legislative review of judicial action would be "subversive of the constitutional independence of the judicial branch of government." *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974). In enacting § 476, Congress

has violated the separation of powers doctrine by usurping powers reserved for the courts.[2]

Since Plaintiff's Motion for Reinstatement is brought under an unconstitutional statute, the motion is DENIED.

IV.

ORDER

ACCORDINGLY, it is ordered:

1) Plaintiff's Motion for Reinstatement, filed February 7, 1992, is DENIED.

2) The above captioned action is DISMISSED.

3) Each party is DIRECTED to bear its own costs.

DATED this 15 day of June, 1992, at Denver, Colorado.

BY THE COURT:

/s/ Sherman G. Finesilver

Sherman G. Finesilver,
Chief Judge
United States District Court

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[2] Plaintiff also contends that § 476 must be interpreted as a change in the law in light of the Supreme Court's recent decision in *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992). However, the United States District Court for the District of Colorado recently found this argument to be without merit. *Johnston v. Cigna Corp.*, 1992 WL 109683 at *2 (D. Colo. May 20, 1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-F-591

HOWARD ROSENTHAL,

Plaintiff,

v.

DEAN WITTER REYNOLDS, INC., *et al.*,

Defendants.

ORDER

This matter comes before the court on Plaintiff's Motion to Dismiss, filed September 20, 1991. On July 24, 1991, the court entered an Order administratively closing the above captioned action pending United States Supreme Court reconsideration of the decision issued in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* No. 90-333 (June 20, 1991). On September 13, 1991, the United States Supreme Court denied the Petition for Rehearing in *Lampf.* Pursuant to Plaintiff's request to Hold Action in Abeyance, filed July 22, 1991, Plaintiff agreed to dismiss the above captioned action if the United States Supreme Court denied the Petition for Rehearing in *Lampf.*

ACCORDINGLY, it is ordered:

1) Plaintiff's Motion to Dismiss is GRANTED.

2) The above captioned action is DISMISSED without prejudice.

3) Each party shall bear his or its own costs.

Dated this 23rd day of September, 1991, at Denver, Colorado.

BY THE COURT:

Sherman G. Finesilver,
Chief Judge
United States District Court

IVAN A. ANIXTER; Blanche Dickenson; Dolly K. Yoshida, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1971 Program Operating Corporation; Home-Stake 1970 Program Operating Corporation; Home-Stake 1969 Program Operating Corporation; Home-Stake 1968 Program Operating Corporation; Home-Stake 1967 Program Operating Corporation; Home-Stake 1966 Program Operating Corporation; Home-Stake 1965 Program Operating Corporation; Robert S. Trippet; E.M. Kunkel; Thomas A. Landrith, Jr.; J.D. Metcalfe; H.B. Gutelius; H.L. Fitzgerald,

Defendants,

AND

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; Norman C. Cross, Jr.,

Defendants-Appellants.

A.M. ANDERSON; Bank of America National Trust and Savings Association, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; Dewey J. Cali; William H. Colquhoun; S.W. Corbin; Robert B. Coburn; Virgil B. Day; William H. Dennier; Mario DiMartino; Stella DiMartino; John M. Evans; Margaret C. Everett; Isador H. Finkelstein; Joseph H. Gauss; H.W. Gouldthorpe; Ralph Hart; James J. Hayes; Earl D. Hilburn; Joseph E. Horak; Gerald A. Hoyt; Richard M. Hurst; Ralph Iannucci; Emily Iannucci; Milton F. Kent; Howard Kicherer; Elizabeth Kicherer; John Kokoszka; Millie B. Lassing; Joseph Levin; Marie F. Levin; John D. Lockton; Dennis G. Lyons; Ferdinand F. McAllister; Russell W. McFall; James Madden; Albert Manganelli; Nicholas A. Marchese; Stanley A. Marks; John G. Martin; C.W. Moeller; Andrew Overby; Carl E. Palermo; Frank A. Palermo;

Roy T. Parker, Jr.; Bruce M. Robertson; D.D. Scarff; M.L. Scarff; A.E. Schubert; William R. Smart; E. Starr; Janet G. Stewart; Gerald Toomey; Paul Townsend; Vernon Underwood; H.B. Waldron, Jr.; Ted B. Westfall,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1970 Program Operating Corporation, a Delaware corporation; Robert S. Trippet; Harry Heller; Simpson Thacher and Bartlett, a partnership; Thomas A. Landrith, Jr.; E.M. Kunkel; McAfee, Taft, Mark, Bond, Rucks, and Woodruff, a professional corporation and its professional employees and attorneys and partners, their successors and assigns,

Defendants,

AND

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; Norman C. Cross, Jr.,

Defendants-Appellants.

A.M. ANDERSON; Richard J. Anton; Bank of America National Trust and Savings Association, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George and Helen Burgess; Dewey J. Cali; Robert B. Coburn; Coburn & Libby, Inc.; Edward V. Coonan; S.W. Corbin; William H. Dennler; Mario DiMartino; Stella DiMartino; John Evans; Margaret C. Everett; L.L. Ferguson; Isador H. Finkelstein; H.W. Gouldthorpe; George L. Haller, Jack Hanson; Ralph A. Hart; F.H. Holt; Joseph E. Horak; Gerald A. Hoyt; Howard G. Kicherer; Elizabeth C. Kicherer; John Kokoszka; Millie B. Lassing; Joseph Levin; Marie Levin; John D. Lockton; D.W. Lynch; D.B. Lynch; Dennis G. Lyons; Ferdinand F. McAllister; Russell McFall; James F. Madden; Albert Manganelli; Nicholas Marchese; Stanley A. Marks; C.W. Moeller; William H. Mortensen; Carl Olson; Patricia Olson; Carl Palermo; Frank Palermo;

Roy T. Parker; Helen M. Reeder; D.D. Scarff; M.L. Scarff; Richard Scott; Louis P. Singer; William R. Smart; J. Stanford Smith; G. Curtis Stewart; Paul Townsend; Vernon Underwood; Ted B. Westfall; J. Howard Wood; Sidney Woolwich; Murray Zimmerman,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1969 Program Operating Corporation, a Delaware corporation; Robert S. Trippet; E.M. Kunkel; Thomas A. Landrith, Jr.; Harry Heller; William Blum; Simpson Thacher and Bartlett; William D. Lewis; Richard A. Ganong; Lewis & Ganong, a partnership,

Defendants,

AND

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.,

Defendant-Appellant.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; Dewey J. Cali; James Clark; Mary Clark; William H. Colquhoun; Edward V. Coonan; S.W. Corbin; William H. Dennier; Mario DiMartino; Stella DiMartino; John Evans; L.L. Ferguson; Jack Fine; Isador H. Finkelstein; Joseph H. Gauss; H.W. Gouldthorpe; James J. Hayes; Earl D. Hilburn; Dorothy C. Holt; Joseph E. Horak; Gerald A. Hoyt; Richard M. Hurst; John E. Hutchinson, III; Harold Kaplan; W.S. Jones; Howard G. Kicherer; Elizabeth Kicherer; John Kokoszka; Millie B. Lassing; Joseph Levin; Marie Levin; D.W. Lynch; D.B. Lynch; Dennis G. Lyons; Ferdinand F. McAllister; Russell W. McFall; Anthony Macagna; James F. Madden; Albert Manganelli; Nicholas A. Marchese; Charles J. Meloun; C.W. Moeller; Carl J. Olson; Patricia Olson; Thomas O. Paine; Carl E. Palermo; Frank A.

Palermo; Roy T. Parker, Jr.; Howard Rubenstein; D.D. Scarff; M.L. Scarff; C.S. Semple; William Smart; J. Stanford Smith; Janet G. Stewart; Gerald Toomey; Oliver J. Troster; H.B. Waldron, Jr.; Humberto Zavaleta; Murray Zimmerman,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1971 Program Operating Corporation, a Delaware corporation; Robert S. Trippet; Harry Heller; Simpson Thacher and Bartlett, a partnership; William Blum; Thomas A. Landrith, Jr.; E.M. Kunkel; McAfee, Taft, Mark, Bond, Rucks, and Woodruff, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; William D. Lewis; Richard A. Ganong; Lewis & Ganong, a partnership,

Defendants,

AND

WYNEMA ANNA CROSS, as Executrix of the Estate of Norman C. Cross, Jr.,

Defendant-Appellant.

IVAN A. ANIXTER; William H. Dennier; John D. Lockton; Francis K. McCune; Ted B. Westfall; William H. Mortensen; Peter P. Luce; William D. Robertson; Bernard D. Broeker; Thomas H. Thorner; Dolly Yoshida Martin; William Grohne; James H. Leachman; Beverly H. Warren; Joseph C. Bennett,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1964 Program Operating Corporation; Home-Stake 1965 Program Operating Corporation; Home-Stake 1966 Program Operating Corporation;

Home-Stake 1967 Program Operating Corporation; Home-Stake 1968 Program Operating Corporation; Home-Stake 1969 Program Operating Corporation; Home-Stake 1970 Program Operating Corporation; Home-Stake 1971 Program Operating Corporation; Home-Stake 1972 Program Operating Corporation; Robert S. Trippet; H.L. Fitzgerald; H.R. Smith; Frank E. Sims; John T. Lenoir; Thomas A. Landrith, Jr.; E.M. Kunkel; Jackson M. Barton; Marvin R. Barnett; Donald C. Larrabee; J.D. Metcalfe; H.B. Gutelius; Carl E. Clay; William E. Murray; Murray, Patterson & Sharpe; Dryfoos & Company; McAfee, Taft, Mark, Bond, Rucks, and Woodruff; Simpson Thacher and Bartlett; Harry Heller; William Blum; Richard A. Ganong; William D. Lewis; Lewis & Ganong; Richard A. Ganong, Inc.; Norman C. Cross, Jr.; Kent Klineman,

Defendants,

AND

CROSS AND COMPANY,

Defendant-Appellant.

IVAN A. ANIXTER; Blanche Dickenson; Dolly K. Yoshida; and Joseph C. Bennett, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1971 Program Operating Corporation; Home-Stake 1970 Program Operating Corporation; Home-Stake 1969 Program Operating Corporation; Home-Stake 1968 Program Operating Corporation; Home-Stake 1967 Program Operating Corporation; Home-Stake 1966 Program Operating Corporation; Home-Stake 1965 Program Operating Corporation; Robert S. Trippet; E.M. Kunkel; Thomas A. Landrith, Jr.; J.D. Metcalfe; H.B. Gutelius; H.L. Fitzgerald; Norman C.

Cross, Jr.; Murray, Patterson & Sharpe, a partnership; Dryfoos & Company, a limited partnership; McAfee, Taft, Mark, Bond, Rucks, and Woodruff, a professional corporation; Simpson Thacher and Bartlett, a partnership; Lewis & Ganong, a partnership; William E. Murray; Kent Klineman; William Blum; Harry Heller; Richard A. Ganong; William D. Lewis; John T. Lenoir; Carl E. Clay; Jackson M. Barton; Marvin R. Barnett; Frank E. Sims; H.R. Smith; Donald C. Larrabee; Richard A. Ganong, Inc., a corporation,

Defendants,

AND

KOTHE & EAGLETON, INC., a professional corporation,

Defendant-Appellant.

IVAN A. ANIXTER; Blanche Dickenson; Dolly K. Yoshida, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1971 Program Operating Corporation; Home-Stake 1970 Program Operating Corporation; Home-Stake 1969 Program Operating Corporation; Home-Stake 1968 Program Operating Corporation; Home-Stake 1967 Program Operating Corporation; Home-Stake 1966 Program Operating Corporation; Home-Stake 1965 Program Operating Corporation; Robert S. Trippet; Thomas A. Landrith, Jr.; J.D. Metcalfe; H.B. Gutelius; H.L. Fitzgerald; Norman C. Cross, Jr.,

Defendants,

AND

E.M. KUNKEL,

Defendant-Appellant.

RICHARD J. ANTON; Morrell H. Blesh; Arthur M. Bueche; S.W. Corbin; Virgil B. Day; William H. Dennler; L.L. Ferguson; Isador H. Finkelstein; Thomas S. Gates; Joseph H. Gauss; Margaret W. Gillespie; H.W. Gouldthorpe; George L. Haller; Ralph A. Hart; Charles M. Heiden; Dorothy C. Holt; Victor Holt, Jr.; Richard M. Hurst; P.J. Jensen; Robert B. Keegan; Milton F. Kent; Millie B. Lassing; John D. Lockton; D.W. Lynch; D.B. Lynch, Ferdinand F. McAllister; Francis K. McCune; Russell W. McFall; John G. Martin; H.D. Meader; Betty Jane Mills; David K. Mills; C.W. Moeller; William H. Mortensen; D.D. Scarff; M.L. Scarff; William R. Smart; J. Stanford Smith; Robert P. Strub; Estate of Vera Strub; Vernon Underwood; Hoyt Ammidon,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Harry Heller; William Blum; Simpson Thacher and Bartlett, a partnership; William D. Lewis; Richard A. Ganong; Home-Stake 1966 Program Operating Corporation; Lewis & Ganong, a partnership; Robert S. Trippet; Thomas A. Landrith, Jr.,

Defendants,

AND

E.M. KUNKEL,

Defendant-Appellant.

MORRELL H. BLESH; Fred J. Borch; S.W. Corbin; Virgil B. Day; William H. Dennler; L.L. Ferguson; Isador H. Finkelstein; George L. Haller; Ralph A. Hart; F.H. Holt; D. Holt; Victor Holt, Jr.; Gerald A. Hoyt; John D. Lockton; D.W. Lynch; D.B. Lynch; F.F. McAllister; Francis K. McCune; John G. Martin; H.D. Meader; C.W. Moeller; William H. Mortensen; D.D. Scarff; M.L. Scarff; J. Stanford Smith; C.G. Suits,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1964 Program Operating Corporation, a Delaware corporation; Robert S. Trippet; Thomas A. Landrith, Jr.; Harry Heller; William Blum; Simpson Thacher and Bartlett, a partnership,

Defendants,

AND

E.M. KUNKEL,

Defendant-Appellant.

A.M. ANDERSON; Bank of America National Trust and Savings Association, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgess; Dewey J. Cali; William H. Colquhoun; S.W. Corbin; Robert B. Coburn; Virgil B. Day; William H. Dennler; Mario DiMartino; Stella DiMartino; John M. Evans; Margaret C. Everett; Isador H. Finkelstein; Joseph H. Gauss; H.W. Gouldthorpe; Ralph Hart; James J. Hayes; Earl D. Hilburn; Joseph E. Horak; Gerald A. Hoyt; Richard M. Hurst; Ralph Iannucci; Emily Iannucci; Milton F. Kent; Howard Kicherer; Elizabeth Kicherer; John Kokoszka; Millie B. Lassing; Joseph Levin; Marie F. Levin; John D. Lockton; Dennis G. Lyons; Ferdinand F. McAllister; Russell W. McFall; James Madden; Albert Manganelli; Nicholas A. Marchese; Stanley A. Marks; John G. Martin; C.W. Moeller; Andrew Overby; Carl E. Palermo; Frank A. Palermo; Roy T. Parker, Jr.; Bruce M. Robertson; D.D. Scarff; M.L. Scarff; A.E. Schubert; William R. Smart; Janet G. Stewart; Gerald Toomey; Paul Toomey; Paul Townsend; Vernon Underwood; H.B. Waldron, Jr.; Ted B. Westfall,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1970 Program Operating Corporation, a Delaware corporation; Robert S. Trippet; Harry Heller;

Simpson Thacher and Bartlett, a partnership; William Blum; Thomas A. Landrith, Jr.; McAfee, Taft, Mark, Bond, Rucks, and Woodruff, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; Norman C. Cross, Jr.,

Defendants,

AND

E.M. KUNKEL,

Defendant-Appellant.

MORRELL H. BLESH; Fred J. Borch; S.W. Corbin; Virgil B. Day; William H. Dennler; L.L. Ferguson; Isador H. Finkelstein; Thomas S. Gates; George L. Haller; Ralph A. Hart; F.H. Holt; D. Holt; Charles M. Heiden; Victor Holt, Jr.; Gerald A. Hoyt; John D. Lockton; Doreen B. Hoyt; Peter J. Jensen; Milton F. Kent; Millie B. Lassing; D.W. Lynch; D.B. Lynch; F.F. McAllister; Francis K. McCune; John G. Martin; H.D. Meader; C.W. Moeller; William H. Mortensen; D.D. Scarff; M.L. Scarff; J. Stanford Smith; C.G. Suits,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1965 Program Operating Corporation; Robert S. Trippet; Thomas A. Landrith, Jr.; Harry Heller; William Blum; Simpson Thacher and Bartlett, a partnership,

Defendants,

AND

E.M. KUNKEL,

Defendant-Appellant.

A.M. ANDERSON; Richard J. Anton; Bank of America National Trust and Savings Association, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George and Helen Burgess; Dewey J. Cali; Robert

B. Coburn; Coburn & Libby, Inc.; Edward V. Coonan; S.W. Corbin; William H. Dennler; Mario DiMartino; Stella DiMartino; John Evans; Margaret C. Everett; L.L. Ferguson; Isador H. Finkelstein; H.W. Gouldthorpe; George L. Haller; Jack Hanson; Ralph Hart; F.H. Holt; Joseph E. Horak; Gerald A. Hoyt; Howard G. and Elizabeth C. Kicherer, John Kokoszka; Millie B. Lassing; Joseph Levin; Marie Levin; John D. Lockton; D.W. and D.B. Lynch; Dennis G. Lyons; Ferdinand F. McAllister; Russell McFall; James F. Madden; Albert Manganelli; Nicholas Marchese; Stanley A. Marks; C.W. Moeller; William H. Mortensen; Carl and Patricia Olson; Carl Palermo; Frank Palermo; Roy T. Parker; Helen M. Reeder; D.D. Scarff; M.L. Scarff; Richard Scott; Louis P. Singer; William R. Smart; J. Stanford Smith; G. Curtis Stewart; Paul Townsend; Vernon Underwood; Ted B. Westfall; J. Howard Wood; Sidney Woolwich and Murray Zimmerman,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1969 Program Operating Corporation, a Delaware corporation; Elmer M. Kunkel; Thomas A. Landrith, Jr.; Harry Heller; William Blum; Simpson Thacher and Bartlett, a partnership; Norman C. Cross, Jr.; William D. Lewis; Richard A. Ganong; Lewis & Ganong, a partnership,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

A.M. ANDERSON; Bank of America National Trust and Savings Association, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgess; Dewey J. Cali; William H. Colquhoun; S.W. Corbin; Robert

B. Coburn; Virgil B. Day; William H. Dennler; Mario DiMartino; Stella DiMartino; John M. Evans; Margaret C. Everett; Isador H. Finkelstein; Joseph H. Gauss; H.W. Gouldthorpe; Ralph Hart; James J. Hayes; Earl D. Hilburn; Joseph E. Horak; Gerald A. Hoyt; Richard M. Hurst; Ralph Iannucci; Emily Iannucci; Milton F. Kent; Howard Kicherer; Elizabeth Kicherer; John Kokoszka; Millie B. Lassing; Joseph Levin; Marie F. Levin; John D. Lockton; Dennis G. Lyons; Ferdinand F. McAllister; Russell W. McFall; James Madden; Albert Manganelli; Nicholas A. Marchese; Stanley A. Marks; John G. Martin; C.W. Moeller; Andrew Overby; Carl E. Palermo; Frank A. Palermo; Roy T. Parker, Jr.; Bruce M. Robertson; D.D. Scarff; M.L. Scarff; A.E. Schubert; William R. Smart; Janet G. Stewart; Gerald Toomey; Paul Townsend; Vernon Underwood; H.B. Waldron, Jr.; Ted B. Westfall,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1968 Program Operating Corporation,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

A.M. ANDERSON; Bank of America National Trust and Savings Association, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; Dewey J. Cali; William H. Colquhoun; S.W. Corbin; Robert B. Coburn; Virgil B. Day; William H. Dennler; Mario DiMartino; Stella DiMartino; John M. Evans; Margaret C. Everett; Isador H. Finkelstein; Joseph H. Gauss; H.W. Gouldthorpe; Ralph Hart; James J. Hayes; Earl D. Hilburn; Joseph E. Horak; Gerald A. Hoyt; Richard M. Hurst; Ralph Iannucci; Emily Iannucci; Milton F. Kent; Howard Kicherer; Elizabeth Kicherer; John B. Kokoszka; Millie B.

Lassing; Joseph Levin; Marie F. Levin; John D. Lockton; Dennis G. Lyons; Ferdinand F. McAllister; Russell W. McFall; James Madden; Albert Manganelli; Nicholas A. Marchese; Stanley A. Marks; John G. Martin; C.W. Moeller; Andrew Overby; Carl E. Palermo; Frank A. Palermo; Roy T. Parker, Jr.; Bruce M. Robertson; D.D. Scarff; M.L. Scarff; A.E. Schubert; William R. Smart; E. Starr; Janet G. Stewart; Gerald Toomey; Paul Townsend; Vernon Underwood; H.B. Waldron, Jr.; Ted B. Westfall,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1970 Program Operating Corporation, a Delaware corporation; Harry Heller, Simpson Thacher and Bartlett, a partnership; Thomas A. Landrith, Jr.; E.M. Kunkel; McAfee, Taft, Mark, Bond, Rucks, and Woodruff, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.; Norman C. Cross, Jr.,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; Dewey J. Cali; James Clark; Mary Clark; William H. Colquhoun; Edward V. Coonan; S.W. Corbin; William H. Dennler; Mario DiMartino; Stella DiMartino; John Evans; L.L. Ferguson; Jack Fine; Isador H. Finkelstein; Joseph H. Gauss; H.W. Gouldthorpe; James J. Hayes; Earl D. Hilburn; Dorothy C. Holt; Joseph E. Horak; Gerald A. Hoyt; Richard M. Hurst; John E. Hutchinson, III; Harold Kaplan; W.S. Jones; Howard G. Kicherer; Elizabeth Kicherer; John

Kokoszka; Millie B. Lassing; Joseph Levin; Marie Levin; D.W. Lynch; D.B. Lynch; Dennis G. Lyons; Ferdinand F. McAllister; Russell W. McFall; Anthony Macagna; James F. Madden; Albert Manganelli; Nicholas A. Marchese; Charles J. Meloun; C.W. Moeller; Carl J. Olson; Patricia Olson; Thomas O. Paine; Carl E. Palermo; Frank A. Palermo; Roy T. Parker, Jr.; Howard Rubenstein; D.D. Scarff; M.L. Scarff; C.S. Semple; William Smart; J. Stanford Smith; Janet G. Stewart; Gerald Toomey; Oliver J. Troster; H.B. Waldron, Jr.; Humberto Zavaleta; Murray Zimmerman,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1971 Program Operating Corporation, a Delaware corporation; Harry Heller; Simpson Thacher and Bartlett, a partnership; William Blum; Thomas A. Landrith, Jr.; E.M. Kunkel; McAfee, Taft, Mark, Bond, Rucks, and Woodruff, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; Norman C. Cross, Jr.; William D. Lewis; Richard A. Ganong; Lewis & Ganong, a partnership,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

RICHARD J. ANTON; Morrell H. Blesh; Arthur M. Bueche; S.W. Corbin; Virgil B. Day; William H. Dennler; L.L. Ferguson; Isador H. Finkelstein; Thomas S. Gates; Joseph H. Gauss; Margaret W. Gillespie; H.W. Gouldthorpe; George L. Haller; Ralph A. Hart; Charles M. Heiden; Dorothy C. Holt; Victor Holt, Jr.; Richard M. Hurst; P.J. Jensen; Robert B. Keegan; Milton F. Kent; Millie B. Lassing; John D. Lockton; D.W. Lynch; D.B. Lynch; Ferdinand F. McAllister;

Francis K. McCune; Russell W. McFall; John G. Martin; H.D. Meader; Betty Jane Mills; David K. Mills; C.W. Moeller; William H. Mortensen; D.D. Scarff; M.L. Scarff; William R. Smart; J. Stanford Smith; Robert P. Strub; Estate of Vera Strub; Vernon Underwood; Hoyt Ammidon,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY; Home-Stake 1967 Program Operating Corporation,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

RICHARD J. ANTON; Morrell H. Blesh; Arthur M. Bueche; S.W. Corbin; Virgil B. Day; William H. Dennler; L.L. Ferguson; Isador H. Finkelstein; Thomas S. Gates; Joseph H. Gauss; Margaret W. Gillespie; H.W. Gouldthorpe; George L. Haller; Ralph A. Hart; Dorothy C. Holt; Fred H. Holt; Victor Holt, Jr.; Richard M. Hurst; P.J. Jensen; Robert B. Keegan; Milton F. Kent; Millie B. Lassing; John D. Lockton; D.W. Lynch; Ferdinand F. McAllister; Francis K. McCune; Russell W. McFall; John G. Martin; H.D. Meader; Betty Jane Mills; David K. Mills; C.W. Moeller; William H. Mortensen; D.D. Scarff; M.L. Scarff; William R. Smart; J. Stanford Smith; Estate of Vera Strub; Vernon Underwood; Hoyt Ammidon,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Harry Heller; William Blum; Simpson Thacher and Bartlett, a partnership; William D. Lewis; Richard A.

Ganong; Home-Stake 1966 Program Operating Corporation; Lewis & Ganong, a partnership; E.M. Kunkel; Thomas A. Landrith, Jr.,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

MORRELL H. BLESH; Fred J. Borch; S.W. Corbin; Virgil B. Day; William H. Dennler; L.L. Ferguson; Isador H. Finkelstein; George L. Haller; Ralph A. Hart; F.H. Holt; D. Holt; Victor Holt, Jr.; Gerald A. Hoyt; John D. Lockton; D.W. Lynch; D.B. Lynch; F.F. McAllister; Francis K. McCune; John G. Martin; H.D. Meader; C.W. Moeller; William H. Mortensen; D.D. Scarff; M.L. Scarff; J. Stanford Smith; C.G. Suits,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1965 Program Operating Corporation; Thomas A. Landrith, Jr.; E.M. Kunkel; Harry Heller; William Blum; Simpson Thacher and Bartlett, a partnership,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

MORRELL H. BLESH; Fred J. Borch; S.W. Corbin; Virgil B. Day; William H. Dennler; L.L. Ferguson; Isador H. Finkelstein; George L. Haller; Ralph A. Hart; F.H. Holt; D. Holt; Victor Holt, Jr.; Gerald A. Hoyt; John D. Lockton; D.W. Lynch; D.B. Lynch; F.F. McAllister; Francis K. McCune; John G. Martin; H.D. Meader; C.W. Moeller; William H.

Mortensen; D.D. Scarff; M.L. Scarff; J. Stanford Smith; C.G. Suits,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1964 Program Operating Corporation, a Delaware corporation; Thomas A. Landrith, Jr.; E.M. Kunkel; Harry Heller; William Blum; Simpson Thacher and Bartlett,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.

IVAN A. ANIXTER; Blanche Dickenson; Dolly K. Yoshida, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1971 Program Operating Corporation; Home-Stake 1970 Program Operating Corporation; Home-Stake 1969 Program Operating Corporation; Home-Stake 1968 Program Operating Corporation; Home-Stake 1967 Program Operating Corporation; Home-Stake 1966 Program Operating Corporation; Home-Stake 1965 Program Operating Corporation; E.M. Kunkel; Thomas A. Landrith, Jr.; J.D. Metcalfe; H.B. Gutelius; H.L. Fitzgerald; Norman C. Cross, Jr.,

Defendants,

AND

ROBERT S. TRIPPET,

Defendant-Appellant.
(Two Cases)

IVAN A. ANIXTER: BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; Home-Stake 1971 Program Operating Corporation; Home-Stake 1970 Program Operating Corporation; Home-Stake 1969 Program Operating Corporation; Home-Stake 1968 Program Operating Corporation; Home-Stake 1967 Program Operating Corporation; Home-Stake 1966 Program Operating Corporation; Home-Stake 1965 Program Operating Corporation; Robert S. Trippet; E.M. Kunkel; Thomas A. Landrith, Jr.; J.D. Metcalfe; H.B. Gutelius; H.L. Fitzgerald; Norman C. Cross, Jr.,

Defendants,

AND

FRANK E. SIMS,

Defendant-Appellant.
(Two Cases)

United States, Intervenor.

Securities and Exchange Commission, Amicus Curiae.

Nos. 90-5040 to 90-5049, 90-5051, 90-5053, 90-5055 to 90-5059, 90-5062 to 90-5067.

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Aug. 24, 1992.

Securities fraud action was filed. After denial of motion to dismiss on ground of statute of limitations, 76 F.R.D. 337, damages were awarded to plaintiffs by the United States District Court for the Northern District of Oklahoma, Manuel L. Real, Chief Judge, sitting by designation. Defendants appealed. The Court of Appeals, 939 F.2d 1420, reversed. On denial of rehearing, the Court of Appeals, 947 F.2d 897, amended order. The Supreme Court, 112 S.Ct. 1658, granted certiorari, vacated judgment, and remanded. On remand, the Court of Appeals, John P. Moore, Circuit Judge, held that: (1) Congressional enactment of special provision in Securities Exchange Act of 1934 relating to statute of limitations on private causes of action was not unconstitutional violation of separation of powers doctrine, and (2) district court did not abuse its discretion in reinstating § 10(b) and Rule 10b-5 claims against two defendants following pretrial order granting partial summary judgment for those defendants on those claims.

Affirmed in part and reversed in part.

1. Constitutional Law - Key#57
Limitation of Actions - Key#4(2)
Securities Regulation - Key#134

Congressional enactment of special provision of Securities and Exchange Act of 1934 relating to statutes of limitation on private causes of action did not violate separation of powers doctrine; special provisions did not direct certain factual findings or impose rule of decision for § 10(b) claims, but rather changed the law by limiting the one-year/three-year statute of limitations to prospective application only and by subjecting § 10(b) claims filed prior to June 19, 1991 to limitations period determined to be applicable by court in which action was filed. Securities Exchange Act of 1934, §§ 10(b), 27A, as amended, 15 U.S.C.A. §§ 78j(b), 78aa-1.

2. Federal Civil Procedure - Key#2559

District court did not abuse its discretion in reinstating § 10(b) and Rule 10b-5 claims against two defendants following pretrial order granting partial summary judgment for those defendants on those claim; under the circumstances of case, pretrial order was not final and hence was subject to revision at any time. Securities Exchange Act of 1934, § 10(b), as amended, 15 U.S.C.A. § 78j(b); Fed.Rules Civ. Proc.Rules 16(e), 54(b), 56(d), 28 U.S.C.A.

Walter Steele, Denver, Colo., and Thomas M. Affeldt, co-counsel, (Jack L. McNulty and C.B. Savage, with them on the briefs), of Savage, O'Donnell, Scott, McNulty & Affeldt, Tulsa, Okl., for defendant-appellant E.M. Kunkel.

B. Hayden Crawford (Kyle B. Haskins, with him on the briefs), of Crawford, Crowe & Bainbridge, P.A., Tulsa, Okl., for defendants-appellants Norman C. Cross, Jr., Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr., and Cross and Co.

Stan P. Doyle (James C. Thomas, with him on the briefs), of Doyle & Harris, Tulsa, Okl., for appellant-defendant Kothe & Eagleton, Inc., a professional corp.

Peter Van N. Lockwood (Albert G. Lauber and Jill R. Shellow, with him on the briefs), of Caplin & Drysdale, Chartered, Washington, D.C., (Elihu Inselbuch of Caplin & Drysdale, New York City, William A. Wineberg and Michael R. Simmonds of Broad, Schulz, Larson & Wineberg, San Francisco, Cal., and William H. Hinkle, Tulsa, Okl., with him on the briefs), for plaintiffs-appellees.

Frank E. Sims, pro se.

Robert S. Trippet, pro se.

Timothy E. Flanigan, Acting Asst. Atty. Gen., Tony M. Graham, U.S. Atty., Barbara C. Biddle and Jeffrey K. Shapiro, Dept. of Justice, Washington, D.C., on the brief, for intervenor U.S.

James R. Doty, Jacob H. Stillman, Leslie E. Smith, and Randall W. Quinn, Washington, D.C., on the brief, for amicus curiae Securities and Exchange Com'n.

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

JOHN P. MOORE, Circuit Judge.

In light of the Supreme Court's order remanding this cause, we directed the parties to file supplemental briefs to address the question whether reinstatement of plaintiffs' Section 10(b) claims is now mandated under Section 27A of the Securities Exchange Act of 1934, § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991. We specified the parties to address *Bank of Denver v. Southeastern Capital Group, Inc.*, 789 F.Supp. 1092 (D.Colo.1992), and *TGX Corp. v. Simmons*, 786 F.Supp. 587 (E.D.La.1992), which together held Section 27A unconstitutional as a violation of the separation of powers doctrine. Because of defendants' constitutional challenge, we granted the government's motion to intervene under 28 U.S.C. § 2403. Upon review of the present decisions generated by Section 27A and the briefs, we conclude Congress properly exercised its legislative function to compel a change in the law. We therefore order plaintiffs' Section 10(b) claims reinstated consistent with this opinion.

I.

Prior Proceedings

In *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420 (10th Cir.1991), we held plaintiffs' claims for violations of §§ 11 and 12 of the Securities Act of 1933 were time-barred under

the applicable statute of limitations found in Section 13 of the Securities Act of 1933 and reversed a judgment in their favor awarding over $130 million in damages against the named defendants. Just before our decision, the Supreme Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* ____ U.S. ____, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), in which it discarded the traditional practice of applying state limitary periods to § 10(b) claims and instead extended the uniform federal scheme for express securities actions to these implied actions. The Court applied the rule to the *Lampf* complaint.

If there was any doubt about applying a rule of federal law retroactively after the case announcing the rule did so, the Court attempted to dispel that doubt in *James B. Beam Distilling Co. v. Georgia,* ____ U.S. ____, ____, 111 S.Ct. 2439, 2447-48, 115 L.Ed.2d 481 (1991), also decided on June 20, 1991. In that case, joined by five other members of the Court in three concurring opinions, Justice Souter announced, "[o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship. . . . " The sure import of *Lampf* and *Beam* directed our dismissal of plaintiffs' Section 10(b) claims as untimely under a similar analysis to that we had applied to the §§ 11 and 12 claims.

On December 19, 1991, after our decision was entered, Congress proscribed *Lampf*'s retroactive application, inserting an amendment into the FDIC Improvement Act of 1991, Pub.L. No. 102-242, 1991 U.S.C.C.A.N. (105 Stat.) 2236, codified as § 27A of the Securities Exchange Act of

1934, 15 U.S.C. § 78aa-1 (Supp. III 1991). The new section stated, in part:

SPECIAL PROVISION RELATING TO STATUTE OF LIMITATIONS ON PRIVATE CAUSES OF ACTION

SEC. 27A. (a) *EFFECT ON PENDING CAUSES OF ACTION.*—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) *EFFECT ON DISMISSED CAUSES OF ACTION.*—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

II.

Constitutionality of Section 27A

[1] We now reconsider plaintiffs' timely motion to reinstate under Section 27A.[1] In support, plaintiffs contend on June 19, 1991, their § 10(b) claims were timely under the applicable Oklahoma two-year limitations period, citing *Hackbart v. Holmes*, 675 F.2d 1114, 1120 (10th Cir.1982).[2] Based on our prior opinion setting April 30, 1971, as the date on which the discovery period began to run, plaintiffs detail the timeliness of each plaintiff class's filing. Their discussion is predicated on the constitutionality of Section 27A and its directive "including principles of retroactivity" to require application of a pre-*Lampf* state statute of limitations. Defendants contest each position.

To date, two Circuits have dealt with Section 27A. *See Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 967 F.2d 742 (2d Cir.1992) (§ 27A cannot save plaintiffs' statute of limitations defense raised for first time on appeal); *Grondahl v. Merritt & Harris, Inc.*, 964 F.2d 1290 (2d Cir.1992) (plaintiff failed to begin action within any of the arguably applicable limitary periods); *Henley v. Slone*, 961 F.2d 23 (2d Cir.1992) (case remanded for district court to consider timeliness of suit under *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir.1990), and *Welch v. Cadre Capital*, 923 F.2d 989 (2d Cir.1991), *vacated and remanded sub nom. Northwest Sav. Bank v. Welch*, ____ U.S. ____, 111 S.Ct. 2882, 115

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[1] Under Section 27A, to qualify for reinstatement plaintiffs must establish (1) their claims were filed on or before June 19, 1991; (2) at that time, their claims were timely under applicable limitary periods; (3) their claims were dismissed as untimely after June 19, 1991; and (4) their motion to reinstate was filed within 60 days of the enactment of § 27A.

[2] The more direct authority is *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir.1974) (Oklahoma two-year statute applies which starts to run from the date of actual or constructive discovery of the fraud).

L.Ed.2d 1048 (1991)); *Pommer v. Medtest Corp.*, 961 F.2d 620 (7th Cir.1992) (case remanded for parties to address application of 27A in light of *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2887, 115 L.Ed.2d 1052 (1991)). None of these cases addressed the constitutionality of § 27A although numerous district courts have now done so with divergent results. *See, e.g., Rosenthal v. Dean Witter Reynolds, Inc.*, No. 91-F-591, slip op. (D.Colo. June 15, 1992) (Section 27A violates separation of powers); *Bank of Denver v. Southeastern Capital Group, Inc.*, 789 F.Supp. at 1092 (Section 27A unconstitutional); *Johnston v. Cigna Corp.*, 789 F.Supp. 1098 (D.Colo.1992); *TGX Corp. v. Simmons*, 786 F.Supp. at 587; *In re Brichard Sec. Litig.*, 788 F.Supp. 1098 (N.D.Cal.1992); *contra In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F.Supp. 1424 (D.Ariz.1992); *Maio v. Advanced Filtration Sys., Ltd.*, 795 F.Supp. 1364 (E.D.Pa.1992); *Brown v. Hutton Group*, 795 F.Supp. 1307 (S.D.N.Y.1992); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F.Supp. 476 (S.D.N.Y.1992).

With the proviso that we do not decide constitutional questions unnecessarily, *Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985), the issue has been put in play here both by the facts of the case and "principles of retroactivity" existing on June 19, 1991, in this Circuit.[3] We therefore cannot avoid deciding whether the separation of powers doctrine barred Congress from enacting § 27A.

In their constitutional challenge, defendants rely principally on *United States v. Klein*, 13 Wall. 128, 80 U.S. 128, 20

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[3] At that time, we applied state limitary periods to § 10(b) claims. On June 19, 1991, absent *Lampf*, Oklahoma's two-year statute of limitations running from the date of actual or constructive discovery of the fraud and incorporating principles of equitable tolling was applicable.

L.Ed. 519, (1871)[4] to urge § 27A violates the doctrines of separation of powers, due process, and equal protection. Central to their analysis is the proposition that § 27A does not change existing law or create new law but specifically commands the courts to decide pending cases in a particular manner and even to direct decisions in cases that have been dismissed. On June 20, 1991, defendants maintain, the *Lampf* interpretation of § 9(e) of the 1934 Securities Exchange Act was and remained the law for all cases pending or to be filed. Enactment of § 27A did not change § 9(e) but only directed the courts to ignore it for a designated class of cases. Hence, defendants urge Congress overstepped its legislative function to mandate judicial decisions.

However, unlike Section 27A now before us, the enactment at issue in *Klein* ordered: (1) the Court of Claims to find evidence of a Presidential pardon or amnesty inadmissible for claimants seeking redress under the Abandoned and Captured Property Act; (2) the Supreme Court to dismiss for lack of jurisdiction any appeal from a Court of Claims judgment based on the claimant's reliance on a pardon; and (3) the

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[4] In *Klein*, 80 U.S. at 128, the administrator of an estate seized during the War between the States, sued in the Court of Claims to recover the proceeds from property sold by government agents. Suit was based on the Abandoned and Captured Property Act of March 3, 1863, 12 Stat. 820, which permitted noncombatant property owners who could prove their loyalty to recover seized property. Later, President Lincoln issued a proclamation granting a full pardon to participants in the rebel cause who affirmed their loyalty, thus conditioning restoration of property rights upon the executive power to pardon. When the Supreme Court decided the Presidential pardon purged the offense and relieved the recipient of any penalties *United States v. Padelford*, 9 Wall. 531, 76 U.S. 531, 19 L.Ed. 788 (1869), Congress introduced a proviso into the appropriation for the Court of Claims ordering that no pardon was admissible in evidence to support a claim against the United States or establish the right of a claimant to bring suit; or, if already introduced into evidence, to be considered either by the Court of Claims or court on appeal. Indeed, proof of acceptance of the pardon was deemed to be conclusive evidence of the acts pardoned requiring dismissal of the suit.

Court of Claims was to treat a claimant's receipt of a Presidential pardon as conclusive evidence of disloyalty. The congressional act was, thus, unconstitutional as an effort "to prescribe a rule for the decision of a cause in a particular way." *Klein,* 80 U.S. at 146.

This case is not *Klein.* Section 27A does not direct courts to make specific factual findings or mandate a result in a particular case. *Brown v. Hutton Group,* 795 F.Supp. 1307; *Axel Johnson, Inc. v. Arthur Andersen & Co.,* 790 F.Supp. at 476. It does not remove or alter the courts' constitutional adjudicatory function. Instead, in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.,* 794 F.Supp. 1424; *TBG, Inc. v. Bendis,* 1992 WL 80622 (D.Kan.1992). Surely Congress has the power to change a rule of law and make that change applicable to pending cases. *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

Were *Klein* ambiguous in aiding our review, we now have the benefit of the Court's analysis in *Robertson v. Seattle Audubon Soc.,* ____ U.S. ____, ____, 112 S.Ct. 1407, 1413, 118 L.Ed.2d 73 (1992), to assure our conviction that § 27A "compelle[d] changes in the law, not findings or results under old law." In that case, certain environmental groups challenged the constitutionality of § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745, the "Northwest Timber Compromise," enacted in response to ongoing litigation concerning the harvesting and sale of timber from old-growth forests in the Pacific Northwest. The target of the challenge was subsection (b)(6)(A) which declared:

> [T]he Congress hereby determines and directs that management of areas according to subsections

> (b)(3) and (b)(5) of this section . . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (Order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

Although the Ninth Circuit held this language rendered the statute unconstitutional because it directed a specific result in two pending cases without repealing or amending existing environmental laws, the Court reversed, concluding the subsection, in fact, changed the law. *Robertson,* ____ U.S. at ____, 112 S.Ct. at 1413. The Court reasoned the operation of the new subsection "modified the old provisions" and did not "direct any particular findings of fact or applications of law, old or new, to fact." *Id.* The statute did not pass on the "legal or factual adequacy" of administrative documents authorizing timber sales or "instruct courts" how to decide particular timber sales. *Id.*[5]

Similarly, Section 27A does not direct certain factual findings or impose a rule of decision for § 10(b) claims.[6] It changes the law. *Axel Johnson,* 790 F.Supp. at 476. "Section 27A merely turns back the legal clock to the period just prior to *Lampf* and then permits courts independently to adjudicate any reopened actions on the basis of the law as they

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[5] Given this analysis, that § 318 amended applicable law, the Court declined to consider the application of *Klein* since the Ninth Circuit had stated if the statute changed the law, it would be constitutional.

[6] "Notably absent from § 27A, unlike the statute held unconstitutional in *Klein,* is a specific directive as to what evidence a court may consider in determining the timeliness of the suit's filing or the case's merits." *Axel Johnson, Inc. v. Arthur Andersen & Co.,* 790 F.Supp. 476, 479 (S.D.N.Y.1992); *see also Adler v. Berg Harmon Assocs.,* 790 F.Supp. 1235 (S.D.N.Y.1992).

determine it then existed." *Adler v. Berg Harmon Assocs.*, 790 F.Supp. 1235, 1243 (S.D.N.Y. 1992).

Indeed, Section 27A changes the law and was intended to change the law.[7] Before its enactment, all § 10(b) claims were governed by the one-year/three-year *Lampf* statute of limitations as applied retroactively by *Beam*. "Section 27A changed the law by limiting the one-year/three-year rule to prospective application only and by subjecting Section 10(b) claims filed prior to June 19, 1991 to the limitations period determined to be applicable by the court in which the action was filed." *Berg Harmon,* 790 F.Supp. at 1243.[8]

In enacting Section 27A, Congress exercised a key legislative power. Statutes of limitations traditionally reside in the legislative branch. "They have come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental'

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[7] Plaintiffs cite extensive legislative history incorporating SEC concerns and news articles decrying *Lampf's* shortening of the statute of limitations and its unfair retroactive application. *See, e.g.*, Barbara Roper, *Stop the Clock on Swindlers,* N.Y. Times, Nov. 19, 1991. During the Senate debate Senator Richard Bryan stated:

> Lampf changed the rules in the middle of the game for thousands of fraud victims who already had suits pending—applying a shorter statute of limitation than when they brought their suits.
>
> . . . .
>
> In effect, this provision in S. 543 overrules the retroactive effect of Lampf and applies the law as it would have been applied in particular circuits the day before the Lampf decision was decided. That would of course include interpretative principles such as retroactivity and equitable tolling.
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> 137 Cong.Rec. 13624 (daily ed. November 27, 1991).

[8] In *Bankard v. First Carolina Communications, Inc.*, 1992 WL 3694, *6 (N.D.Ill. Jan. 6, 1992), the district court noted, "Congress has changed the law. It might seem otherwise only because instead of delineating fully the change of law, Congress has made the change by reference, incorporating the prevailing law in the applicable jurisdiction."

right . . . ." *Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945). In this sense, our case more closely resembles *United States v. Sioux Nation of Indians,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980), in which the Court affirmed Congress' power to enact legislation waiving the res judicata defense of a prior judgment. "Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question." *Axel Johnson,* 790 F.Supp. at 483.

It is this peculiar realm of legislative prerogative which nullifies defendants' additional contentions of denial of due process and equal protection, propped on the belief our prior dismissal gave them a vested right in a judgment that Congress cannot now annul. The constitutional test was stated in *Chase Securities:*

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking life, liberty or property without due process of law . . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.

325 U.S. at 315-16, 65 S.Ct. at 1142-43 (quoted in *International Union of Elec. Wkrs., AFL CIO, Local 790 v. Robbins & Myers,* 429 U.S. 229, 243-44, 97 S.Ct. 441, 450-51, 50 L.Ed.2d 427 (1976)). In 27A, Congress evinced a legitimate purpose to protect the reasonable expectations of litigants who relied on

established law in filing § 10(b) actions. Section 27A is rationally related to that legislative purpose.[9]

Finally, contrary to defendants' assertions, *Beam* was carefully crafted to garner a plurality to agree only that retroactive application of a rule of law announced in a case was a matter of a choice of law and not of constitutional import. *Beam* did not declare unconstitutional the practice of selective prospectivity as evidenced by Justice White's concurring opinion.[10]

Consequently, we hold § 27A constitutional. Plaintiffs timely moved to reinstate their claims under § 27A(b). We therefore reinstate the verdict with regard to the relief awarded for violations of § 10(b) and Rule 10b-5.

III.

Pretrial Ruling

[2] With the resuscitation of plaintiffs' § 10(b) claims, an issue left unaddressed by our prior disposition under *Lampf* is resurrected. That issue, raised by defendants Kothe and Eagleton, Inc., (K & E) and E.M. Kunkel (Kunkel), asks whether the district court committed reversible error in

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[9] We reject defendants' equal protection argument that it is irrational for Congress to permit courts to treat people in one state differently from those in another with respect to a statute of limitations defense. As we have noted in the first instance, limitary defenses are a matter of legislative grace. Defendants make too much of this technical defense. Similarly, defendants urging § 9(e) is a preemptive statute of limitations is irrelevant to the analysis of the constitutionality of Section 27A.

[10] Justice Souter stated:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity. ____ U.S. at ____ ,111 S.Ct. at 2448.

reinstating § 10(b) and Rule 10b-5 claims against these two defendants. In a pretrial order, the district court had granted partial summary judgment for K & E and Kunkel on these claims. Seventeen days into the trial, close to the end of the plaintiffs' presentation of evidence, the district court reinstated the claims (R.V. 25, at 3874) without explanation or contemporaneous objection from K & E or Kunkel. The following day, however, the district court denied respective motions for a mistrial, rejecting without comment defendants' assertions of prejudice which, they claimed, could not be overcome at that stage in the trial.

On appeal, K & E and Kunkel press this contention, urging they proceeded to trial relying on the pretrial order designating only the Section 11 claim against them. Plaintiffs reply defendants were at all times aware of the factual allegations they intended to prove at trial, many of which implicated the elements of proof of a § 10(b) claim. Although K & E and Kunkel allege reinstatement caused them prejudice, plaintiffs maintain defendants failed to specify any witnesses who would have been recalled or were not fully cross-examined to substantiate their claim.

The answer to defendants' contention lies somewhere in the interstices of Fed.R.Civ.P. 54(b),[11] 56(d),[12] and 16(e),[13] governing judgments, summary judgments, and pretrial orders. Under Rule 56(d), summary adjudication of only

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[11] Fed.R.Civ.P. 54(b) states:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[12] Fed.R.Civ.P. 56(d) states:

Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

[13] Fed.R.Civ.P. 16(e) states:

Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

some of the claims imposes a duty on the trial court to "if practicable" articulate what facts are established and which remain controverted. The final sentence of Rule 56(d) states: "Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." In our case, the district court offered no explanation of the basis for granting partial summary judgment. Within the elaborate factual scenario plaintiffs set forth to establish their claims of securities fraud, we can only speculate about the alleged lack of proof on which the district court relied.

Nevertheless, the district court's order granting partial summary judgment for K & E and Kunkel on the § 10(b) claims is not a final judgment under Fed.R.Civ.P. 54(b). Under Rule 54(b), this order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Unless the district court makes the "express determination" under Rule 54(b) that "there is no just reason for delay" and the "express direction for the entry of judgment," partial summary judgment of fewer than all of the claims or parties "shall not terminate the action as to any of the claims or parties" and may be revised at any time before final judgment is entered on all of the claims and parties.

> It follows . . . that if the order which the court makes under Rule 56(d) is not a final judgment, but is an interlocutory order, the concluding sentence of Rule 56(d) would not prevent the trial court from altering its order as to what facts are established. Unless good cause is shown the court should not, of course, do so; but it surely has power to revise an interlocutory order that specifies which facts are established and which facts remain for trial.

6 J. Moore, W. Taggart, & J. Wicker, *Moore's Federal Practice* ¶ 56.20[3.-4], at 56-707 (2d ed. 1992). A component of this power is Rule 16(e) which permits modification of the pretrial order "only to prevent manifest injustice."

Within the interplay of these rules, we must properly acknowledge the role of the trial judge, which is broadly circumscribed by the discretion to conduct the trial proceedings consistent with what plays out before the court, not inflexibly constrained by pretrial rulings which may not be borne out by the trial process. In certain circumstances, premature granting of a motion for partial summary judgment should not force the district court to pre-try the action. *Moore's Federal Practice* ¶ 56.02[5], at 56-37. As the court noted in *Audi Vision Inc. v. RCA Mfg. Co.*, 136 F.2d 621, 625 (2d Cir.1943):

> It should be clearly recognized that orders of the district court of the type entered in this action below [partial summary judgment] are in essence only pretrial orders, as explicitly provided for in Rule 16 and again in the summary judgment rule, Rule 56(d), when a complete summary judgment is not granted. But such an order is expressly subject to modification "at the trial to prevent manifest injustice." If the district court will take care in cases such as this to make it clear that its order is of the pre-trial type as authorized under these rules, the parties will then more fully recognize their rights and the court will have retained full power, as it should, to make one complete adjudication on all aspects of the case when the proper time arrives.

Under this analysis, we therefore hold the district court did not abuse its discretion in reinstating these claims. Under the circumstances of this case, the court's pre-trial order was not final and hence subject to revision at any time.

Our holding the district court did not abuse its discretion in reinstating the § 10(b) and Rule 10b-5 claims against K & E and Kunkel is sobered by the voluminous record in this appeal. The multiple classes and numerous defendants involved in this multidistrict litigation consuming more than

a decade spawned a hydra for the presiding trial judge. That the trial court chose to revise its prior order upon hearing the bulk of plaintiffs' evidence cannot now be second-guessed. Although we do not agree with plaintiffs' cavalier homogenization of Section 11 and Section 10(b) claims, we do not believe, under all of the facts and circumstances detailed in the record before us, that K & E and Kunkel have substantiated their claim of prejudice. Because of that circumstance, we hold the district court did not abuse its discretion in reinstating these claims. The judgment of the district court, therefore, is AFFIRMED in part and REVERSED in part.

15 § 78i. Manipulation of security prices

Persons liable; suits at law or in equity

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

June 6, 1934, c. 404, Title I, § 9, 48 Stat. 889.

15 § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, Title I, § 10, 48 Stat. 891.

CONSTITUTION
OF THE UNITED STATES

ARTICLE I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

CONSTITUTION
OF THE UNITED STATES

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The courts which have found Section 27A to be constitutional include:

Agapitos v. PCM Inv. Co., 809 F. Supp. 939 (M.D. Ga. 1992); *Dendinger v. First Nat. Corp.*, 1992 WL 318593 (E.D. La.); *In re First American Center Securities Litigation*, 807 F. Supp. 326 (S.D.N.Y. 1992); *Ash v. Dean Witter Reynolds, Inc.*, 806 F. Supp. 1473 (E.D. Cal. 1992); *Ram Inv. Associates v. Citizens Fidelity Bank & Trust Co.*, 1992 WL 240594 (S.D.N.Y.); *In re Crazy Eddie Securities Litigation*, 802 F. Supp. 804 (E.D.N.Y. 1992); *In re American Continental Corporation*, 140 F.R.D. 425 (D.C. Az. 1992); *Adler v. Berg Harmon Associates*, 790 F. Supp. 1235 (S.D.N.Y. 1992); *Brown v. Hutton Group*, 795 F. Supp. 1307 (S.D.N.Y. 1992); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp 476 (S.D.N.Y. 1992); *In re Melridge, Inc.*, 1992 WL 58265 (D. Or.); *TBG, Inc. v. Bendis*, 1992 WL 80622 (D. Kan.); *Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 574 (E.D.N.C. 1992); *Ayers v. Sutliffe*, 1992 WL 207235 (S.D. Oh.); *Bankard v. First Carolina Communications, Inc.*, 1992 WL 3694 (N.D. Ill.)

The courts which have found Section 27A to be unconstitutional include:

TGX Corp. v. Gaylor Simmons, 786 F. Supp. 587 (E.D. La. 1992); *Bank of Denver v. Southeastern Capital Group, Inc.*, 770 F. Supp. 595 (D. Colo. 1992); *Pacific Mutual v. First Republic Bank Corporation*, 806 F. Supp. 108 (N.D. Tex. 1992); *Treiber v. Katz*, 796 F. Supp. 1054 (E.D. Mich. 1992); *Duldue v. Cigna Securities, Inc.*, (E.D. Mich. 1992); *Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231 (E.D. Ky. 1992); *Johnston v. Cigna Corporation*, 789 F. Supp. 1098 (D. Colo. 1992); *In re Brichard Securities Litigation*, 788 F. Supp. 1098 (N.D. Cal. 1992); *Mancino v. International Technology Corp.*, 1992 WL 114436 (C.D. Cal.)